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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 705

GEORGE WILLIAM BRUTON,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

DANIEL P. REARDON, JR.
Attorney for Petitioner
216 Buder Building, 7 N. 7th St.
St. Louis, Missouri 63101
Garfield 1-6860

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Opinions Below

The order of the District Court denying a motion for a new trial (R. 271) is in the Appendix at page 8. The opinion of the Court of Appeals is reported at 375 F. 2d 355.

Jurisdiction

The judgment of the Court of Appeals (Appen. 16) was entered on March 22, 1967. The petition for a writ of certiorari was filed on May 16, 1967 and was granted on October 9, 1967. The jurisdiction of this Court rests on 28 U.S.C. Par. 1254(1).

Question Presented

Whether Petitioner George William Bruton was substantially prejudiced when the jury heard an illegally and unconstitutionally obtained admission of his co-defendant William James Evans which implicated the petitioner as his accomplice in the robbery of a postal contract station in violation of 18 U.S.C., Section 2114 (1948).

Statement of Case

Paul J. Robinson operates a jewelry store located at 3809 South Kingshighway in the City of St. Louis (R. 146, 147). In conjunction with his jewelry store, Mr. Robinson is a contract operator for the St. Louis Post Office, having operated for some three years as Contract Station Number 7 (R. 147). Miss Shirley Miller, an employee of the Robinson Jewelry Company for approximately eight years, assists Mr. Robinson in operating this postal contract station (R. 90). At approximately 2 P.M. on Good Friday, April 16, 1965 both Miss Miller and Mr. Robinson were at the store (R. 90, 147). Mr. Robinson was in the rear of the store repairing watches (R. 147) and Miss Miller was working at the desk in the back part of the store (R. 90, 91) as two young negroes entered the store (R. 92). Miss Miller proceeded to the front of the store to wait on the men (R. 92). The individual Miss Miller later identified as Evans (R. 93), wished to look at engagement rings. After viewing some rings, the same individual proceeded further to the rear of the store to look at some watches (R. 94). Miss Miller commenced showing some watches when this same individual was observed pulling a gun (R. 94).

Almost simultaneously the second man, later identified by Miss Miller as Bruton (R. 97) also drew a gun (R. 95). After the weapons were drawn, Miss Miller states that Evans proceeded to the rear portion of the store where Mr. Robinson was working and Bruton remained with her in the front of the store (R. 96, 97). Miss Miller testified that she remained in the front of the store facing the second man, identified as Bruton, for "just a minute or two" (R. 97). Then she was ordered to the rear of the store (R. 97). In the rear or work portion of the store both Mr. Robinson and Miss Miller were ordered to lie face down (R. 98, 99, 149). The legs and arms of each victim were then bound while lying on the floor (R. 100). The two individuals then proceeded to the safes, activity at the cash register was overheard and glass was broken in a display case (R. 98, 99). After the two men fled the scene, Miss Miller freed herself and Mr. Robinson and the police were notified of the occurrence (R. 104, 105). Approximately $30.00 in Government funds were discovered missing at this time (R. 103, 104). George L. Mason, a finance examiner for the Post Office performed an audit after the offense and set the loss at $30.34 (R. 164, 165).

On the following Good Friday, April 8, 1966, both Miss Miller and Mr. Robinson viewed a lineup at Police Headquarters and identified William Evans (R. 106, 108, 152, 153). On April 25, 1966, Miss Miller identified George W. Bruton in a lineup of four (R. 108, 109), although she failed to identify the same Mr. Bruton when she viewed a lineup of which he was a member in November or December, 1965 (R. 126).

Miss Miller and Mr. Robinson both stated that they had seen Evans in the store as a customer prior to the robbery

(R. 105, 151). Miss Miller had never seen the individual identified as Bruton prior to the time of the offense (R. 130), and Mr. Robinson could not identify Mr. Bruton as the second individual involved as he didn't see him (R. 163).

Subsequent to this postal robbery, William James Evans was charged with robbery in the First Degree of a Western Union office by the State of Missouri on March 23, 1966 and he was confined in the St. Louis City Jail. Several days before April 8, 1966, Detectives Farmer and Bradley of the St. Louis Metropolitan Police had brought Miss Miller photographs of Evans (R. 116), and at that time she identified him as one of the participants (Fol. 117). Detective Farmer had questioned Evans on April 4, 1966, at the City Jail, at which time Farmer learned that Evans was represented by an attorney, Alfred Harris (R. 33).

On April 8, 1966, Evans was placed in a lineup viewed by Mr. Robinson and Miss Miller and he was identified as a participant in the robbery of Post Office Contract Station No. 7 (R. 106-107). On this same day during three separate interviews, Detectives Farmer and Bradley questioned Evans concerning the robbery of the Post Office Contract Station without informing him of his right to remain silent and without informing him of his right to an attorney, although Farmer was aware that Evans was represented by counsel (R. 34, 35). During the first two interrogations conducted Evans denied his involvement in the offense perpetrated at the Robinson Jewelry Company (R. 35). Finally, during the third interrogation Evans admitted his participation in the offense and implicated Bruton (R. 37).

On April 11, 1966 Detective Farmer brought Postal Inspector J. B. Thorn to the City Jail to interview Evans without informing Evans' attorney (R. 34). Evans was informed of his right to silence, and that he had a right

to counsel, but Thorn didn't advise him that his statements would be used against him (R. 177-183). At that time Thorn knew that Evans had been identified by Miss Miller and Mr. Robinson as a participant in the robbery (R. 16). Inspector Thorn then obtained an oral statement from Evans wherein he implicated himself and another in the robbery of the Post Office Contract Station (R. 171). On this same day a Federal Warrant was filed against Evans and he became a Federal prisoner on May 3, 1966 after the State of Missouri dropped its charges against him (R. 21, 49, 50).

Subsequently, on April 25, 1966, a Federal Warrant was sworn out against George William Bruton (Appen. 3) as he was identified in a lineup on that day by Miss Miller, as noted above (R. 109).

Postal Inspector Thorn then interrogated Evans again; this time on May 4, 1966 (R. 172). At this point, he confessed in detail as to the perpetration of the crime, implicating not only himself but also Bruton (R. 173-176).

During the trial of the two defendants, the Government made numerous references to Evans' confession which implicated co-defendant Bruton. In his opening statement, the Assistant United States Attorney said:

> "Thorn will testify that later, on May 4th, while Evans was confined in the St. Louis City Jail, awaiting trial on this charge, he went and re-interviewed him, and he will testify that at this time Evans told him that he had committed the robbery, that he and Bruton, Evans [sic] will testify that he and Bruton were riding around looking for a place to hold up and they got in South St. Louis, and they decided on Robinson Jewelry Store" (R. 87).

During the Direct Examination of Thorn the confession was introduced into evidence as follows:

> "He [Evans] stated that he and Bruton were driving around, they went by the jewelry store and thought this would be a good one. They went in the jewelry store and looked around. After being in for a little while they went ahead with the armed robbery, the victims were tied up, the phone was disconnected, they left the building by the back door, went down the alley, got into their automobile, and drove north on Kingshighway" (R. 173).

In the Government's closing argument it was noted:

> "Now, Mr. Cooper asked questions, 'Well, was there talk about the state charges being dropped? Was there talk about him having trouble with Bruton's girl friend?' All this. He says to Farmer and Thorn, 'I was riding around with Bruton. We were looking for a place to hold up. We decided on the jewelry store. We committed a holdup. We bound them, Bruton and I ran out the back, across the alley, back into Famous-Barr and left.' That's the statement" (R. 206).

The Government went on to add:

> "This statement (the confession) that the Court just told you is admissible is admissible to evidence, this statement is to be considered by you as evidence. The statement was made on May 4th. They want you to believe that there was some trouble between Bruton and Evans and Evans just making the statement out of sheer vengeance. But you recall that Bruton was arrested and identified as a participant in this holdup on April 25th by Miss Miller. Therefore he is already charged. He can't get him in any more trouble. So

that knocks the voluntariness or the attack on voluntariness out as far as getting vengeance on Bruton . . . " (R. 207).

Following a guilty verdict, the motions of both defendants for a new trial were denied. On appeal to the Eighth Circuit Court of Appeals, Evans' conviction was reversed on the basis of the illegality of the confession. However, it was denied that the introduction of that confession was prejudicial to Bruton's case and his conviction was affirmed (Appendix 16). It is this ruling which is appealed.

ARGUMENT

I.

The Eighth Circuit Erroneously Affirmed Petitioner Bruton's Conviction in Holding That Petitioner Was Afforded Sufficient Protection by the Trial Court's Instructions Limiting the Jury's Consideration of an Implicative Admission Illegally and Unconstitutionally Obtained From a Co-Defendant.

The United States District Court at the trial of the Petitioner and his co-defendant clearly and unequivocally cautioned the jury not to consider the Evans' admission in any respect in determining the guilt or innocence of George William Bruton. (The Eighth Circuit Court of Appeals, relying upon the instructions, based its decision upon an improper extension of *Delli Paoli* v. *United States,* 352 U.S. 232 (1957).) Speaking for the Court, Judge Mathes stated:

"The rule is firmly established that in a joint trial, an incriminating statement made by one defendant

> which would implicate another defendant is admissible into evidence only against the declarant. The corollary of this rule is that the admission into evidence of a co-defendant's statement, under proper cautionary and limiting instruction will not necessarily require a reversal of the conviction of the other defendant." 375 F. 2d 355 (1967).

The Eighth Circuit concluded that the District Court's instructions to the jury provided Bruton with sufficient protection and the Petitioner was, therefore, not prejudiced. Mr. Bruton's jury presumably performed, therefore, what Judge Learned Hand called "a mental gymnastic which is beyond, not only their powers, but anybody else's." *Nash* v. *United States* (2nd Cir.), 54 F. 2d 1006 (1932). The "sufficient protection" found by the Eighth Circuit in the cautionary instructions and the finding that Petitioner was not prejudiced was aptly characterized by Mr. Justice Jackson in a comment found in *Krulewitch* v. *United States,* 336 U.S. 440, 453 (1949) wherein he stated: "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practising lawyers know to be unmitigated fiction."

As the Court of Appeals has relied upon the teachings found in *Delli Paoli* v. *United States,* 352 U.S. 232 (1957) and three decisions emanating from Circuit Courts of Appeal, two from the Eighth Circuit, *Haggard* v. *United States,* 369 F. 2d 968 (1966) and *Colliher* v. *United States,* 362 F. 2d 594 (1966); and *United States* v. *Gardner* (7th Cir.), 347 F. 2d 405, it will be well to briefly review what the majority had to say in the *Delli Paoli* case. Delli Paoli was one of five defendants jointly tried and convicted of

conspiring to deal unlawfully in alcohol. Only Delli Paoli appealed and his principal complaint rested in the assertion that the trial court committed reversible error by admitting in evidence a confession of a co-defendant. The trial court refused to delete references to Delli Paoli but instructed the jury clearly and carefully that the confession was to be considered only in weighing the guilt of the confessor. Mr. Justice Burton, speaking for the majority, scrutinized the evidence adduced against Delli Paoli and reached the following conclusion:

> "Accordingly, we agree with Circuit Judge Learned Hand's statement made for the court below, following his own summary of the evidence of Petitioner's participation in the conspiracy:
>
> 'Not only was all this enough to connect him with the business, but the jurors could hardly have failed to find that he was in the enterprise. The whole business was illegal and carried on surreptitiously; and the possibility that unless he were a party to the venture, Pierro and Margrasso would have associated (with) him to the extent we have mentioned is too remote for serious discussion. 229 F.2d 320." 352 U.S. 232, 236.

The majority opinion is carefully predicated and conditioned upon a consideration of all of the factual circumstances. For this reason the Court weighed, as indicated, all of the evidence implicating Delli Paoli and reached the conclusion quoted above. It is therefore clearly implied that under certain circumstances the instructions alone cannot supply sufficient protection. In addition to the strength of the evidence against Delli Paoli, it is of

striking interest to note that the confession of his co-defendant Whitley was valid and not contested as illegally obtained. These two factors serve to distinguish the instant case with *Delli Paoli.*

The evidence against Petitioner Bruton, other than the confession of co-defendant Evans, constituted nothing more than a weak eye-witness identification case. The record reveals that the postal contract station was robbed by two negroes on April 16, 1965. Bruton was described by the single identifying witness, Miss Shirley Miller, as the second man in the robbery whom she had never seen prior to the date of the robbery and whom she observed for two or three minutes while the robbery was in progress. During this period of time her attention was diverted from the second man, allegedly Bruton, by her concern for the activities of the other robber and a concern for her employer. On April 8, 1966 Detective Oscar Farmer illegally obtained an admission from co-defendant Evans and this admission included "confidential" information concerning the other man involved. Thereafter, Bruton was arrested by Detective Farmer and placed in a lineup on April 25, 1966 to be viewed by Miss Miller who was escorted to police headquarters by none other than Detective Farmer himself. At this time, one year, two weeks and three days after the robbery, Miss Miller was able to make a positive identification of the Petitioner although he had been shown to her in a lineup conducted several months prior to the lineup conducted after Detective Farmer had illegally obtained "confidential" information. The interval of better than one year between the robbery and the fateful lineup suggests enough concerning the strength of the identification. Human experience establishes the inherent weakness

of the government's case. In *United States* v. *Wade,* 388 U.S. 218 (1967), Mr. Justice Brennan made the following observations concerning the nature of this type of evidence:

> " . . . identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. The vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: 'What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials.' "

Petitioner urges that in the factual setting at hand the Court's instructions limiting the applicability of Evans' confession does not provide the sufficient protection required by the majority in the *Delli Paoli* opinion. What may have been sufficient protection in the *Delli Paoli* factual situation cannot be found in the instant case. In support of this contention the Petitioner can only point to the preparation and presentation of the government's case. Prior to the identification of Bruton, Postal Inspector Thorn had obtained an admission from Evans. Why, then, should he return to re-question Evans unless he had the need and design to obtain a statement implicating Bruton? Inspector Thorn's endeavors were not left unheeded by the prosecution. The Assistant United States Attorney seized upon the opportunity to mention Bruton's name as often as possible, in fact, seventeen times while discussing the Evans' admission.

A second factor serves to distinguish the instant case from *Delli Paoli.* In *Delli Paoli* the validity of the implicating admission of the co-defendant was not questioned. With regard to co-defendant Evans' admission implicating the Petitioner, the Eighth Circuit Court of Appeals held:

> "The totality of the circumstances impel us to hold that the confessions before the jury were tainted and infected by the poison of the prior, concededly unconstitutional confession obtained by the local officer . . . .
>
> " . . . On this record we hold that there was a causal relationship between the unconstitutional confession and the later incriminating statements which were imparted to the jury. This being the situation, a reversal of Evans' conviction is required." 375 F.2d 355.

Speaking for the minority of four in *Delli Paoli,* Mr. Justice Frankfurter stated:

> "The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds." 352 U.S. 212, 248.

In the instant case, the Government has not been deprived of the windfall of the Evans' admission with respect to Petitioner Bruton, even though the evidence was illegally obtained and resulted in a new trial being granted to Evans alone. Petitioner suggests that the instructions do not constitute an instrument of magic that can be seized upon to deprive him of a trial wherein a jury will not be exposed to unconstitutionally obtained evidence.

II.

The Correct Question Is Whether There Is a Reasonable Possibility That the Illegally Obtained Implicating Admission of a Co-Defendant Might Have Contributed to Petitioner's Conviction. The Eighth Circuit Erroneously Overlooked This Acid Test and Misconstrued Delli Paoli v. United States, 352 U.S. 232 (1957), in Affirming the Trial Court.

In addition to the two crucial factual distinctions existing between the instant case and *Delli Paoli,* Petitioner urges that the standards of *Delli Paoli* simply do not apply to the case at bar. The proper test to be applied was announced by this Court in *Fahy* v. *Connecticut,* 375 U.S. 85 (1963) wherein the Chief Justice stated:

> "We find that the erroneous admission of this unconstitutionally obtained evidence at this petitioner's trial was prejudicial; therefore, the error was not harmless, and the conviction must be reversed. We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. *The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction* (emphasis ours). To decide this question, it is necessary to review the facts of the case and the evidence adduced at trial." At 86, 87.

The "reasonable possibility" that the evidence complained of might have contributed to Bruton's conviction is demonstrated forcefully in this case. In the re-trial of Evans, a jury on June 5, 1967 found the co-defendant not guilty.

The weight the admission had in corroborating the identification evidence cannot be minimized. The effect with respect to Petitioner Bruton is clear when the weakness of his identification is brought to mind. The Eighth Circuit noted:

> " . . . the evidence relating to his (Bruton's) identification was weaker than that pertaining to Evans'." 375 F.2d 361.

The action of the Eighth Circuit in reversing as to one defendant and affirming as to another wherein the trial included evidence of illegally obtained confessions is inconsistent with the action and conclusion reached by this Court in *Anderson, et al.* v. *United States,* 318 U.S. 350 (1942) wherein jury heard illegally obtained confessions of six co-defendants who appealed their convictions along with Anderson and another defendant who did not confess. The incriminating statements of each defendant implicated all the remaining defendants, including the two who did not confess. In *Anderson* the Government urged that only the convictions of the six petitioners who had confessed should be reversed if the confessions were held inadmissible. This contention, consistent with the holding of the Eighth Circuit in the instant case, was rejected by this Court as follows:

> "Since it was error to admit these confessions, we see no escape from the conclusion that the convictions of all the petitioners must be set aside." 318 U.S. 350, 357.

Several decisions of other Circuits highlight the impropriety of the Eighth Circuit's application of the *Delli Paoli*

formula in the present factual context. An illuminating analysis of *Delli Paoli* can be found in *U. S.* v. *Daniel Bozza, et al.*, 365 F.2d 206 (2nd Cir.) 1966. Bozza was one of six defendants tried in a multi-count indictment for post office burglaries. The Government's case rested principally upon the testimony of an accomplice. In addition, the jury heard the confession of a co-defendant that implicated each defendant although the identity of each defendant as mentioned in the confession was deleted and not heard by the jury. The jury was instructed forthwith to regard the confession as evidence against the confessor alone and in his final charge to the jury, the trial court again cautioned the jury with regard to the proper and limited use of the confession. The Second Circuit stated:

> "Not even appellate judges can be expected to be so naive as really to believe that all twelve jurors succeeded in performing what Judge L. Hand aptly called 'a mental gymnastic which is beyond, not only their powers, but anybody else's' (citation omitted). . . .
>
> "The Government argues that however this may stand as a matter of good sense, *Delli Paoli* v. *United States*, 352 U.S. 232 . . . and decisions of this Court cause it to stand otherwise as a matter of law; these decisions, it argues in substance, have created a conclusive presumption that the jury will follow a proper instruction to consider a confession only against the confessor. . . .
>
> "We do not read *Delli Paoli* as going so far. Indeed, as was immediately noticed, the novelty of the decision lay not in the result but in the agreement of the five justices in the majority and the four dissenters in refusing to consider an instruction as inevitably suffi-

> cient, cf. Blumenthal v. United States, 332 U.S. 539 . . . thereby implicitly recognizing that there may be situations in which admission of a confession implicating co-defendants would be prejudicial in spite of proper instruction." Page 216.

The Second Circuit found the validly obtained confession furnished devastating corroboration of the testimony of the principal Government witness. *Delli Paoli* was not regarded as controlling and the trial court was reversed. Petitioner points out that the illegally obtained implicating admission in the case at bar provided the Government with devastating corroboration of a weak identification case.

The District of Columbia Circuit had before it a question analogous with the issue raised herein by the Petitioner. In *Greenwell* v. *United States,* 336 F.2d 962 (1964) the Appellant was tried with a co-defendant whose confession was admitted in evidence. In a separate appellate proceeding it was held that the co-defendant's confession was illegally obtained and erroneously admitted into evidence against him. The Government relied upon *Delli Paoli* which the Court properly distinguished by pointing out that in the *Delli Paoli* decision the incriminating statement was admissible while Greenwell's co-defendant's remarks were inadmissible. The Court stated:

> "We conclude that the admission of Seals' confession, since it was improper as to Seals, justifies the retrial of his co-defendant, Greenwell, in a proceeding in which this confession does not reach the jury." 336 F.2d 962, 969.

The distinction drawn in the *Greenwell* opinion with respect to *Delli Paoli* is at odds witih the Eighth Circuit's con-

struction of that same opinion in the instant case. Petitioner urges that it was erroneous to deny him a new trial while affording this relief to his co-defendant from whom admissions were illegally obtained. It is of additional interest to note that the Court in *Greenwell* recognized the correct test to be applied. The test, overlooked by the Eighth Circuit, is whether there is a reasonable possibility that the evidence complained of might have contributed to Bruton's conviction. *Fahy* v. *Conn.*, 375 U.S. 85 (1963).

Laughlin v. *U. S.*, 344 F.2d 187 (1965) is another decision inconsistent with the Eighth Circuit's disposition of the Petitioner's cause. In *Laughlin* inadmissible recordings were used by the Government against Laughlin. With this error permeating the record the District of Columbia Circuit considered whether a new trial should also be afforded Laughlin's co-defendant. The Court stated:

> "... we must now consider whether their admission requires reversal as to both appellants. The jury was carefully instructed that the recordings were only to be considered evidence against appellant Laughlin ... we cannot say that there was not a reasonable possibility that the evidence complained of might have contributed to the conviction. The Court's limiting instruction does not cure the prejudicial effect of evidence which is competent against neither Forte nor Laughlin. We therefore hold that the convictions of both appellants on each count of the indictment should be reversed" (192, 193).

Similar reasoning and the application of the *Fahy* rule would have led the Eighth Circuit to reverse Petitioner

Bruton's conviction rather than strain the thrust of *Delli Paoli*. Another opinion drawing realistic bounds upon the *Delli Paoli* holding can be found in *United States ex rel. Floyd* v. *Wilkins*, 367 F.2d 990, 2nd Circuit (1966). See also: *Ashcraft* v. *State of Tennessee*, 322 U.S. 143 (1944). *Barton* v. *United States*, 263 F.2d 894, 5th Cir. (1959).

Conclusion

Petitioner George William Bruton respectfully urges that there existed a reasonable possibility that his jury was influenced when it heard an illegally obtained statement of a co-defendant implicating him in the robbery of the postal contract station. The trial court's cautionary and limiting instructions with respect to the co-defendant's admission failed to provide Petitioner with sufficient protection. The reasonable possibility of prejudice flowing to the Petitioner is adequately demonstrated by a consideration of the innate weakness of the Government's identification case. Petitioner respectfully requests a new trial be granted and the Eighth Circuit reversed.

Respectfully submitted,

DANIEL P. REARDON, JR.
Attorney for Petitioner
216 Buder Building, 7 N. 7th St.
St. Louis, Missouri 63101